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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CITY OF PLEASANT GROVE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

**On Appeal from The United States
District Court for the District of Columbia**

REPLY BRIEF

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REPLY BRIEF

The Government's brief fails to rebut Pleasant Grove's showing that the district court's findings with respect to the racial motivation for the city's annexation "policy" are clearly erroneous.

1. Pleasant Grove has not "[s]ince its incorporation in the 1930s . . . been an 'all-white enclave in an otherwise racially mixed area of Alabama' " (G. Br., p. 2). Until after the Glasgow Annexation and the development of the Pleasant Grove Highlands subdivision in the late 1970s (D. 78, pp. 80-81), Pleasant

Grove was surrounded by uninhabited land or land sparsely settled by white people (D 17, Ex. B; D. 80, G. Ex. 35)¹. Between 1933 and 1967 Pleasant Grove expanded in all directions, north, east, south, and west. City's Br., pp. 5-6. These annexations took in no black people and very few white for the simple reason that no black people and very few white people lived in the area immediately surrounding Pleasant Grove during that period. The postal and census maps filed below (D. 17, Ex. B; D. 80, G. Ex. 35) show that except for the Highlands and Dolomite to the southeast of the city the area surrounding Pleasant Grove remains almost completely undeveloped, and thus uninhabited, to this day.

The Government has never suggested, nor can it plausibly suggest, that the annexation of Dolomite is or ever was in the economic interest of Pleasant Grove. The Highlands, jointly with the Five-Acre Road area, was the first area inhabited by blacks to petition Pleasant Grove for annexation. It makes no sense, therefore, to say that before the decision not to annex the Highlands, the city had a policy not to annex black areas. The issue could not arise because there were no contiguous black areas to annex and none, therefore, had ever petitioned for annexation.

¹ In the 1980 Census there were 20 cities and towns reporting populations in the Birmingham Division of Jefferson County. The percentage of blacks living in four of these municipalities, Ful-tondale, Brookside, Mountain Brook, and Vestavia Hills was less than in Pleasant Grove. D. 35, G. Ex. 11. Thus, the list of municipalities with relatively larger black populations in the Government's brief (p. 2, n. 2) does not present a complete picture. Neither of these lists proves anything because the relevant fact is who lived in the immediate vicinity of Pleasant Grove.

2. Pleasant Grove proffered its refusal to annex two white areas, the Kohler and Westminster areas, as evidence that its annexation policy, to the extent there was one, was to annex undeveloped land rather than areas exclusively inhabited by whites. Mayor Patrick testified that the Kohler and Westminster areas were objectionable because they were developed and for the additional reason that their annexation would create the "mushroom" problem. D. 41g, p. 91, see pp. 55-56, 103-104. If "you take one, [then] I think from the gentlemen's standpoint you are going to find it difficult not to take the next one." D. 41g., p. 104. The Kohler area petitioned in 1969 before Pleasant Grove Highlands was developed. JA 8 and Ex. B. The Westminster area petitioned in 1979 (D. 78 p. 114) after the Highlands were developed, but the Westminster area borders on Dolomite, not the Highlands (D. 17, Ex. B).

Thus the "next one" is not the Highlands but Dolomite and the refusal to annex Dolomite is clearly commanded by economic considerations. Accordingly, the Government's interpretation of the Mayor's testimony as suggesting racial motivation (G. Br., p. 3) is erroneous.

3. It is an exaggeration to say, based on this record, that Pleasant Grove "facilitated the active pursuit" of the joint petition of Sylvan Springs and West Grove for annexation (G. Br., p. 4). The record reveals only that a petition was submitted, Pleasant Grove appointed a committee, the committee asked United States Steel Corporation, an intervening landowner, whether it was disposed to consent, and when United States Steel said no, the matter was dropped. D. 49, pp. 1-3. Although the record with respect to the ear-

lier annexations is sparse, what drove all these annexations, we respectfully submit, was not the city seeking to add people, but groups trying to get into Pleasant Grove, either as in the case of the Western Addition, developers or, as in the case of the Glasgow Addition and the Highlands, other groups seeking the high level of services and low level of taxes provided by the city's water and natural gas distribution business.

4. Despite the district court's statement to that effect which the Government's brief recites, Pleasant Grove did not argue in its motion for summary judgment that "proof of discriminatory purpose, absent proof of effect, is insufficient to establish a violation of Section 5 of the Voting Rights Act" (G. Br., p. 9). In that motion, after showing that the annexation of the Western Addition would have no discriminatory effect, the city made the following argument as to purpose.

The Mayor and each of the Councilmen in office on February 5, 1979, have stated under oath why they supported the annexation which was approved on that date. None stated that any racial issue ever arose, and there is no reason, in this specific context, why such an issue would have arisen. The petition to annex West Smithfield Manor [the Highlands] and the Five Acre Road area, which did confront the Council with a racial issue, was not submitted to the Mayor until more than two (2) months later. Because the proposed annexation could not conceivably have had the effect of denying blacks the right to vote on account of their race there

is no basis whatsoever for inferring that that was the purpose. A purpose of denying blacks the right to vote in Pleasant Grove would best be served not by annexation of land for development but by a policy of no-growth, because the sale of any house in Pleasant Grove brings with it some chance that a black person will purchase it. [D. 24, pp. 4-5, citations omitted]

The district court's error, we respectfully submit, derives from concentrating on the decision not to annex the Highlands, which is not subject to Section 5, rather than concentrating on the decision to annex the Western Addition, which is subject to Section 5. At the time the City Council of Pleasant Grove voted to annex the Western Addition, it was simply repeating a pattern it had established in 1967, with the approval of the Justice Department, to wit, annexing undeveloped land. At that time, the City Councilmen had no way of knowing that the Highlands, the first black area ever to be contiguous to the city and thus a legal candidate for annexation, would petition two months later for annexation.

Assuming *arguendo* that the Highlands was rejected for racial reasons, moreover, does not establish that the Western Annexation was approved for racial reasons. The Government's brief (pp. 31-36) argues at length that the city's economic justification for annexing the Western Addition was insubstantial and pretextual and concludes that the annexation was motivated by a discriminatory purpose. What the Government fails to say is what that discriminatory purpose was. Pleasant Grove, at the time it approved the Western Annexation, was all-white and had no

petition for annexation pending from black areas. What conceivable racial reason could the city have for annexing the Western Addition?

5. The Government's brief correctly summarizes the district court's findings concerning certain reports submitted by the city's fire and sanitation departments. G. Br., pp. 10-11, n. 9. Although it is true that these partly incorrect evaluations were produced by certain of the city's departments, they were never adopted by the city as the basis for its decision not to annex the Highlands, and they were not relied on by the city in this litigation (D. 91, p. 10; J.S. App. 23a).

6. The Government correctly asserts that if the Highlands were annexed, its inhabitants would retain their right to vote in Jefferson County elections. G. Br., p. 22. The city's suggestion that inhabitants of the Highlands would lose that right if annexed to Pleasant Grove (City's Br., p. 23) is incorrect. The legal argument which follows that suggestion, however, is still valid. Black control as a racial voting bloc of those services provided before annexation by Jefferson County, such as police, fire, street and sanitation, etc., but after annexation by Pleasant Grove, would be greatly diminished. Accordingly, with respect to voting for the essential services which local governments provide, the annexation would have a racially discriminatory effect.

7. Contrary to the statement in the Government's brief (p. 31) without citation to the record or the city's brief, Pleasant Grove does not assert that it relied on its annexation committee appointed after commencement of this litigation in refusing to annex the Highlands. In the parties' submissions on the merits

below both Pleasant Grove (D. 85, p. 9) and the Government (D. 90, p. 16) agreed, with appropriate citations to the record, that the committee made no recommendation to the City Council. Pleasant Grove never argued that it relied on a committee recommendation which according to its own argument was never made.

8. The Government's brief incorrectly summarizes the district court's findings concerning the city's estimate of the sum that development fees in the Western Addition would generate (G. Br., pp. 12, n.8, 33). The July 14, 1980, letter estimating \$1,014,600 in fees and the letter a month earlier estimating \$1,424,500 were written not to the city council but to the city's counsel (J.S. App. 9a; D. 76, Exs. 2 and 3). The letters were not relied on by the city in this litigation or even in its submission to the Justice Department. The letter to the Justice Department which contains the \$768,250 figure was also never relied on in this litigation. D. 66; Ex. 1, Attachment 5.

9. It is not true as the Government suggests that the city's comparative economic justification for annexing the Western Addition and refusing to annex the Highlands consists of a totalizing of the revenues to be derived from the annexation of the Western Addition, without regard to costs, and a corresponding calculation of the costs associated with annexation of the Highlands, without regard to revenues (G. Br., 35).

The city's analysis assumes that the annexation of the Highlands and the annexation of an equal number of homes in the Western Addition will bring in the same amount in *ad valorem* taxes. This assumption favors the Highlands because the development so far

planned for the Western Annexation is a continuation of Highland Forest, the city's most expensive neighborhood, with homes selling in the range of \$75,000 to \$150,000. D. 78, pp. 78-79. The Highland is roughly equivalent to the city's Timbercrest area where homes sell in the range of \$50,000 to 75,000. D. 78, p. 59. The city's analysis further assumes no capital improvements for either annexation because (1) the Government argues that none will be required if the Highlands is annexed and (2) the city council has never provided for any capital improvements with respect to the Western Addition, nor have the developers requested such improvements as a precondition to development (D. 78, pp. 70-71, 76-77).²

² The district court faulted the city without citation to the record for not deducting the cost of "such necessary construction as a new fire station, a major traffic artery, and a new neighborhood park" (J.S. App. 10a, n. 21). The testimony, however, was not that the construction was actually "necessary" in the sense that Pleasant Grove would not receive the expected development fees if the construction were not undertaken. Mayor Patrick testified that major capital expenditures would have to be made whatever direction the city chose to expand in, so that "you can't go both ways," but "id not say what would happen if the expenditures were not made. D. 78, p. 53. Mayor Morrison testified that the city already had reached capacity in its recreation areas (D. 30f, p. 40) and probably already needed an additional fire station, but "it is something in politics that somebody leaves for somebody else to do" (*id.*, p. 45). If a new fire station were not built, "it would simply mean the rate would go up, the insurance policy would go up on the City of Pleasant Grove" (*id.*, p. 44). The district court erred in not recognizing that additional capital facilities in the west of the city were already indicated by development in the western section of the much larger 1967 annexation and that these additional facilities, though desirable, were not a necessary precondition for receiving the expected development fees.

The city's calculations do not ignore the Highlands' capacity for development (G. Br., p. 33). Ms. Mays stated in her affidavit that she did not include "Building Permits" in the items of revenue to the city which might increase in approximate proportion to population if the city were to annex the Highlands because she had been told that there had been little recent development in the Highlands. JA 22, n. 1. Nothing in the record suggests that that conclusion is wrong.

The Western Addition annexation is more favorable economically not only in that the city will not give up \$45,820 in development fees on the first 79 houses but also in that the city will start receiving the \$45,820 before it has to provide any services.

The Government's argument that the cost of fire and police protection cannot be counted in assessing the costs of annexing the Highlands because these services are already provided free ignores (1) the fact that the services can be withdrawn at any time, (2) that the city can now give priority to emergencies within the city, and (3) that the reasons which led the city to provide free fire and police protection to its nearest neighbors will logically lead the city to again provide such services to its new nearest neighbors after the Highlands is annexed.³ If it really makes no difference that the fire and police protection is provided without legal obligation, why did the Highlands petition for annexation in reaction to the city's withdrawal of fire protection? Finally, should the Government make an argument which punishes Pleasant

³ The city's police jurisdiction, for example, extends one and one-half miles from the city limits. D. 30f, p. 6.

Grove for an act of generosity?

WHEREFORE, for the foregoing additional reasons, appellant respectfully submits that the judgment of the district court should be reversed.⁴

Respectfully submitted,

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⁴ There have been two developments which may affect the outcome of this case. First, Birmingham annexed the Highlands pursuant to a vote taken on August 13, 1985. However, the annexation was challenged and set aside. *T. J. Wilkinson, et al. v. City of Birmingham* (Circuit Court of the 10th Judicial Circuit of Alabama, Bessemer Division, decided June 19, 1986). The case is now on appeal to the Alabama Supreme Court. Second, the city now has five black homeowners and three black employees.